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No. 92-610

In The

Supreme Court of the United States

October Term, 1992

ROY E. SHERMAN,

Petitioner,

vs.

WILLIAM F. LUDINGTON, CHASE PACKAGING CORPORATION, BAG MERGER CORPORATION AND UNION CAMP CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal court, sitting in diversity jurisdiction, should apply federal principles of *res judicata* in considering the preclusive effect of a prior federal judgment from a federal court sitting in federal question jurisdiction.

2. Whether the scope and effect of a federal court sitting in diversity jurisdiction and considering the preclusive effect of a prior federal judgment from a federal court sitting in federal question jurisdiction is defined by the Erie Doctrine in applying federal principles of *res judicata.*

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Roy E. Sherman, and the respondents, William F. Ludington, Chase Packaging Corporation, Bag Merger Corporation and Union Camp Corporation.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provision, Rule and Statute Involves	2
Statement of the Case	4
Reasons for Denying the Writ	9
I. Petitioner's writ of certiorari should be denied because it fails to satisfy the character of reasons the Court will consider for review under Supreme Court Rule 10.	9
II. Whether the Sixth Circuit applied state or federal *res judicata* law was not outcome determinative in the captioned matter.	11
III. The Circuit Courts are not in a state of conflict or confusion in applying federal *res judicata* principles.	14

Contents

Page

IV. Whether the application of federal res judicata law, by a federal court sitting in diversity jurisdiction and determining the preclusive effect of a prior federal judgment, violates the Erie Doctrine. 20

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

Aerojet-General Corporation v. Askew, 511 F.2d 710 (5th Cir. 1975) 21

American Motorists Ins. Co. v. General Host Corp., 946 F.2d 1482 (10th Cir. 1991) 15

Anderson v. Richards, 173 Ohio St. 50, 179 N.E. 2d 918 (1962) 12

Answering Service, Inc. v. Egan, 728 F.2d 1500 (D.C. Cir. 1984) 16, 19

Bates v. Union Oil Co. of California, 944 F.2d 647 (9th Cir. 1991) 18

Cemer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978) . 21

Constantini v. Trans World Airlines, 681 F.2d 1199 (9th Cir. 1982) 18

Donegal Steel Foundry Co. v. Accurate Products Co., 516 F.2d 583 (3rd Cir. 1975) 17

Contents

	Page
Erie R. Co. v. Thomkins, 204 U.S. 311 (1938)	20
Henderson v. Ryan, 13 Ohio St.2d 31, 233 N.E.2d 506 (1967)	13
Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983)	16, 21
Interstate Pipe Maintenance, Inc. v. FMC Corp., 775 F.2d 1495 (11th Cir. 1985)	13
Iowa Elec. Light and Power v. Mobile Aerial Towers, 723 F.2d 50 (8th Cir. 1983)	18
Johnson v. SCA Disposal Services of New England, 931 F.2d 970 (1st Cir. 1991)	21
Kale v. Combined Insurance Company of America, 924 F.2d 1161 (1st Cir. 1991)	12, 13
Kern v. Hettinger, 303 F.2d 333 (2nd Cir. 1962)	20, 21
Lane v. Sullivan, 900 F.2d 1247 (8th Cir. 1990)	18
Lubrizol Corp. v. Exxon Corp., 929 F.2d 960 (3rd Cir. 1991)	17, 20
Monrosa v. Carbon Black Exort, Inc., 359 U.S. 180 (1959)	10
Montana v. United States, 440 U.S. 147 (1979)	18

Contents

Page

Norwood v. McDonald, 142 Ohio St. 299, 52 N.E.2d 67 (1943) 11, 12

Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329 (10th Cir. 1988) 15

Poe v. John Deere Co., 695 F.2d 1103 (8th Cir. 1982) 17, 18

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 10

Shoup v. Bell & Howell Co., 872 F.2d 1178 (4th Cir. 1989) 15, 16

Stromberg v. Bd. of Ed. of Bratenahl, 64 Ohio St. 2d 98, 413 N.E. 2d 1184 (1980) 12

Statutes Cited:

28 U.S.C. § 1254(1) 2

29 U.S.C. § 623 5

29 U.S.C. § 1144 5

42 U.S.C. § 1981 17

Ohio Revised Code § 4101.17 5

Rules Cited:

Supreme Court Rule 2, 9, 22

Contents

Page

Restatement (Second) of Judgments § 87 ..... 15, 16

APPENDIX

Appendix A – Motion of the United States District Court for the Northern District of Ohio, Eastern District 1a

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request the Court deny petitioner's Writ of Certiorari.

OPINIONS BELOW

1. July 7, 1992 Sixth Circuit Court of Appeals Order Affirming the District Court's Judgment in the captioned proceeding, *Sherman v. Ludington, et al.*, Case No. 91-3936,

United States Court of Appeals, Sixth Circuit, Judges Jones, Norris and Woods. (See Petitioner's Writ, App. A.)

2. September 10, 1992 Memorandum, Opinion and Order granting respondent's Motion for Summary Judgment in the captioned proceeding, *Sherman v. Ludington, et al.*, Case No. 1:91CV0673, United States District Court, Northern District of Ohio, Eastern Division, Judge Ann Aldrich. (See Petitioner's Writ, App. D.)

3. May 21, 1991 Sixth Circuit Court of Appeals Order affirming the District Court's Judgment in *Sherman v. Chase Packaging Corp.*, Case No. 90-4033, United States Court of Appeals, Sixth Circuit, Judges Jones, Suhrheinrich and Contie. (See Petitioner's Writ, App. B.)

4. October 22, 1990 Memorandum of Opinion and Order granting respondent's Motion for Summary Judgment in *Sherman v. Chase Packaging Corp.*, Case No. C89-1230, United States District Court, Northern District of Ohio, Eastern Division, Judge Alice M. Batchelder. (See Petitioner's Writ, App. C.)

STATEMENT OF JURISDICTION

Petitioner invokes jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, RULE AND STATUTE INVOLVED

Rule 10. Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted

only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a

petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

STATEMENT OF THE CASE

This matter arises from a Complaint filed on March 21, 1991 in the Cuyahoga County, Ohio, Common Pleas Court by petitioner Roy E. Sherman (hereinafter "Sherman" or "petitioner") against respondents William F. Ludington ("Ludington"), Chase Packaging Corporation ("Chase"), Bag Merger Corporation ("Bag Merger") and Union Camp Corporation ("Union Camp") (hereafter collectively "respondents") in connection with Sherman's discharge from Chase on or about January 5, 1989.

This action, which will hereafter be referred to as "Sherman II," is the second Complaint filed by petitioner in connection with his discharge from employment at Chase. Petitioner was discharged by Chase when Chase sold the paper mill at which petitioner was employed to a third party. The third party did not offer petitioner a continued position of employment, although it did offer continued employment to other Chase employees. The Sherman II Complaint alleges that Chase's president, Ludington, made false representations to petitioner on January 20, 1989, telling him that although there were presently no employment positions open at Chase, petitioner would be called if an opening occurred. Relying on this representation, petitioner alleges that he never recontacted anyone at Chase regarding potential openings and was unable to avail himself to other employment opportunities.

On April 10, 1991, respondents removed Sherman II to the United States District Court, Northern District of Ohio, based upon diversity of citizenship. Respondents filed a joint Answer, denying the essential allegations of the Complaint and asserting the

affirmative defenses of *res judicata*, collateral estoppel, bar and merger.

The genesis of Sherman II arises from the original five-count Complaint petitioner filed on June 27, 1989, against Chase captioned *Sherman v. Chase Packaging Corp.*, Case No. 89CV1230, in the United States District Court, Northern District of Ohio, Eastern Division, hereafter referred to as "Sherman I." Just as in the Sherman II action, Sherman I involved the same termination of petitioner from his employment at Chase. The Sherman I Complaint alleged violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623, violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144, age discrimination in violation of Ohio Rev. Code § 4101.17, and pendent state law claims for breach of an alleged employment contract, promissory estoppel and negligent performance of contractual obligations. Chase filed its Motion for Summary Judgment on September 11, 1990.

On September 24, 1990, just seventeen (17) days prior to the scheduled trial date of Sherman I, petitioner filed a Motion for Leave to Amend the Complaint to "correct typographical errors." On October 4, 1990, eleven (11) days prior to the date of trial, petitioner filed a Second Amended Complaint seeking to add new, state law claims for intentional and negligent misrepresentation. Petitioner's grounds for the new claims were that he was unaware of subsequent openings at Chase until depositions were taken just prior to trial on September 4-6, 1990 and, attached to the Second Amended Complaint was an alleged transcript of a telephone conversation which petitioner alleges he had with Ludington, Chase's president, on January 13, 1989, containing the representations petitioner complained of.

Petitioner's claim that Chase did not oppose amendment to the Complaint is completely untrue. Chase opposed the Second

Amended Complaint and filed its Brief in Opposition on October 12, 1990, alleging that the Second Amended Complaint was not based on new evidence and would severely prejudice Chase at the trial of the action (Appendix A). Further, the purported telephone conversation was taped five (5) months prior to filing of the Sherman I Complaint and could not be considered new evidence.

On October 22, 1990, the District Court issued a Memorandum of Opinion and Order granting Chase summary judgment and denying petitioner leave to file an Amended Complaint, finding that:

> Such Motions on the eve of trial are not welltaken, especially when it is obvious that the party asserting the new claim has had the facts which form the basis of the new claim throughout the litigation. This is clearly the case here. The misrepresentation claims, which are based on the transcript of a January 1989 phone conversation, either were or should have been apparent to plaintiff's counsel at the outset of the case.

Petitioner's Writ, Appendix C, at p. 30a.

An appeal of the District Court's Order was taken by petitioner to the United States Court of Appeals for the Sixth Circuit, captioned *Sherman v. Chase Packaging Corp.*, Case No. 90-4033. The Sixth Circuit affirmed the District Court in all respects, including the District Court's denial to amend the Complaint and add claims for misrepresentation. In addressing petitioner's last-minute attempt to amend his Complaint, the Court commented:

> The district court concluded that the facts which formed the basis of plaintiff's "new claims" were known to him from the time of the original Complaint was filed and should have been apparent from the outset. We agree.

Petitioner's Writ, Appendix B, at p. 18a.

Additionally, the Sixth Circuit noted that petitioner's claim that he was unaware, prior to the September 4-6, 1990 depositions, that jobs became available after his discharge and were filled by younger people was *not true*. Petitioner received this information in Chase's answers to plaintiff's discovery served on February 7, 1990, seven (7) months prior to petitioner's attempted amendment to his Complaint.

Further, the court held:

> Because plaintiff unduly delayed making this claim and because granting the motion would cause prejudice to defendant (who had no notice), it was not an abuse of discretion for the district court to deny the motion. (Citations omitted.)

Petitioner's Writ, Appendix B, at p. 19a.

While Sherman I was on appeal in the Sixth Circuit, petitioner filed the instant action in state court on March 21, 1991, asserting the same claims for misrepresentation arising out of the same January, 1989 telephone conversation. Chase removed Sherman II to federal district court on diversity.

Petitioner claims that Sherman II is not the same cause of action as Sherman I because Sherman II arises from

representations made during the January 13, 1989 telephone conversation with Ludington and does not arise from petitioner's discharge from Chase on or about January 6, 1989. The District Court found that Sherman II is essentially the same claim that petitioner tried unsuccessfully to amend in his Complaint in Sherman I, and the doctrine of res *judicata* prevents him from raising this claim for a second time in Sherman II. Further, the Court stated:

> The fact that Sherman was allegedly terminated on one day and then promised first chance at a new position several days later does not lead to the conclusion that his claims arose at different times; such an interpretation is absurd. It is clear that the operative facts took place during a short period of time, and that Sherman was aware of all these facts when he filed the complaint that was the basis of his first case.

Petitioner's Writ, Appendix D, at p. 56a. In reaching its decision, the District Court applied Ohio state *res judicata* law.

Petitioner appealed the District Court's decision to the Sixth Circuit Court of Appeals, case captioned *Sherman v. Ludington, et al.*, Case No. 91-3936. In their Appellee Brief, respondents raised the issue as to whether state or federal *res judicata* law applies to the instant action. The Sixth Circuit required supplemental briefs from both petitioner and respondents on the issue.

The Sixth Circuit filed its opinion on July 7, 1992, following oral argument and review of the briefs and supplemental briefs. The Sixth Circuit affirmed the district court in all respects, but determined that the instant diversity action is governed by federal rules of *res judicata.* The Sixth Circuit noted that all events

relevant to Sherman II took place during the same time period and constituted the same transaction. Specifically, the Sixth Circuit found that petitioner's termination, and the January 13, 1989 telephone conversation with Ludington one (1) week after petitioner's termination, involved the same transaction, and petitioner possessed the facts and evidence to litigate his misrepresentation claims at an earlier date. However, he neglected to do so.

Petitioner brings the instant Writ to determine whether state or federal *res judicata* law controls the instant action.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT FAILS TO SATISFY THE CHARACTER OF REASONS THE COURT WILL CONSIDER FOR REVIEW UNDER SUPREME COURT RULE 10.

The review of a petition for writ of certiorari is governed by Sup. Ct. R. 10. Although not controlling or a full measure of the Court's discretion, Rule 10 provides that the following indicate the character of reasons that will be considered by the Court:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by

> a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Moreover, the court will only grant a petition for writ of certiorari for special and important reasons. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955). The court decides issues of public importance, but decides them in the context of meaningful litigation. *Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180 (1959). The captioned matter fits none of the above criteria because regardless of whether the court applied federal or state *res judicata* law in the captioned matter, it was not outcome determinative. In addition, Ohio *res judicata* law is not dissimilar from the federal *res judicata* law applied in the instant action.

Petitioner seeks review of the instant action, asserting that conflict and confusion exist between the federal courts of appeal with respect to this choice of law issue. Petitioner claims that the appellate federal courts are in conflict regarding whether to apply federal or state *res judicata* law in a federal diversity action determining the effect to be given a prior judgment in a federal court exercising federal question jurisdiction. A careful review of the pertinent courts of appeal decisions regarding this issue reveals

that petitioner greatly overstates any conflict or confusion between the circuits.

II.

WHETHER THE SIXTH CIRCUIT APPLIED STATE OR FEDERAL *RES JUDICATA* LAW WAS NOT OUTCOME DETERMINATIVE IN THE CAPTIONED MATTER.

Petitioner's Writ should not be granted because regardless of whether the Court applied Ohio or federal *res judicata* law, the outcome of the captioned matter would be the same. Both federal and Ohio *res judicata* law are substantially similar in their application.

The seminal case discussing Ohio *res judicata* law is *Norwood v. McDonald,* 142 Ohio St. 299, 52 N.E.2d 67 (1943). In the Syllabus by the Court at ¶1, *res judicata* law in Ohio is defined as:

> 1. A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action between the parties or those in privity with them.

In determining whether the subsequent action is based on the same claim or cause of action and will act to bar the subsequent action under the doctrine of *res judicata,* the primary tests are:

> the identity of investigative facts creating the right of action in each case; the identity of the

> evidence necessary to sustain each action; and the accural of the alleged rights of action.

Id. at ¶ 4 (Syllabus by the Court).

Applying these tests in the instant action, the district court found petitioner failed to meet any of them. The court found that the operative facts underlying the Sherman I and Sherman II claims were the same, it was absurd to say the Sherman I and Sherman II claims arose at different times, and the same evidence sustained each claim. (See petitioner's Writ, App. D at p. 56a.)

Further, Ohio law bars not only claims that were actually litigated, but also those claims that were capable of being brought by a party. *Stromberg v. Bd. of Ed. of Bratenahl,* 64 Ohio St.2d 98, 413 N.E.2d 1184 (1980). *Anderson v. Richards,* 173 Ohio St. 50, 179 N.E.2d 918 (1962).

Like Ohio law, the federal law of *res judicata is* interpreted broadly. In applying federal *res judicata* law, the Sixth Circuit adopted the test set forth in *Kale v. Combined Insurance Company of America,* 924 F.2d 1161 (lst Cir. 1991), which elements include: (1) a final judgment on the merits in the prior action; (2) identity of the causes of action in both the earlier and the later suits; and (3) the identity of the parties or privies in the two suits. *Id.* 924 F.2d at 1165. In determining whether the two claims involve a single cause of action, the *Kale* court stated:

> if the claims asserted in [the two suits], . . . were sufficiently related, that is, if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong, the two suits advanced the same cause of action notwithstanding any differences in

> remedies sought or theories of recovery pleaded.

Id. at 1166.

Just like the district court, the Sixth Circuit determined that petitioner relied on the same evidence in Sherman I and II, both claims arose from the same operative facts, the events relevant to both suits occurred at the same time and constituted the same transaction, and petitioner sought damages for the same injury, *i.e.*, petitioner's discharge and continued loss of employment from Chase.

Further, just as under Ohio law, federal *res judicata* law bars subsequent suits between the same parties on the same cause of action as to all issues that could have been litigated. *Interstate Pipe Maintenance, Inc. v. FMC Corp.*, 775 F.2d 1495, 1497 (11th Cir. 1985); *Kale*, 924 F.2d at 1164.

The only distinct difference between federal and state *res judicata* law is that federal law requires that both actions seek compensation for the same basic wrong. Thus, not only are the two tests substantially similar, but the federal test is more stringent in its proof.

Therefore, petitioner's claim that there is uncertainty in the choice of law and that applying principles of federal *res judicata* severely prejudiced him is unfounded. The law applied by the Sixth Circuit in this action was not outcome determinative.[1]

---

1. Petitioner's reference to the primary right - primary duty test, which he claims would have changed the outcome of the instant action if the court had applied it, was defined in *Henderson v. Ryan*, 13 Ohio St. 2d 31, 233 N.E. 2d 506 (1967). A careful reading of *Henderson* reveals that the case involved the application of that test with respect to a since repealed Ohio Revised Code Section that severely restricted joinder of cause of action. The primary right - primary duty test has seen little application in Ohio.

This action is not an example of the Sixth Circuit arbitrarily applying federal *res judicata* law for the purpose of dismissing a so-called meritorious claim in the name of efficiency. This claim would not have survived regardless of the application of state or federal law. As a result, granting petitioner's Writ would serve no useful purpose and would not redress petitioner for an error made by the courts.

III.

THE CIRCUIT COURTS ARE NOT IN A STATE OF CONFLICT OR CONFUSION IN APPLYING FEDERAL *RES JUDICATA* PRINCIPLES.

The issue before the Court is whether a federal court sitting in diversity jurisdiction must apply state or federal *res judicata* law in determining the preclusive effect of a prior federal court's judgment exercising federal question jurisdiction. The circuit courts have broadened the issue to whether a district court sitting in diversity jurisdiction must apply federal or state *res judicata* law in determining the preclusive effect of a prior diversity federal court judgment. Petitioner claims that the circuits are in direct conflict and in a state of confusion with respect to the issue. A careful review of the circuit court's opinions demonstrates that petitioner greatly overstates the conflict, if any, that exists.

Petitioner admits at page 12 of his petition that the majority of circuit courts, which include the First, Second, Fifth, Sixth, Seventh and Eleventh Circuits, apply federal res *judicata* law to determine the preclusive effect of federal judgment regardless of the jurisdictional basis of the court. Although this is true, this contention is much broader than the issue presented in the instant action.

Other Circuits have joined the majority as well, and they include the Fourth and Tenth Circuits. The Fourth and Tenth

Circuits have both adopted the "federal law controls" rule in Restatement (Second) of Judgments § 87, which provides:

> The rules of *res judicata* are not easily classifiable for purposes of determining whether a federal rule or a state rule should be used to determine a particular effect of a federal judgment. Some aspects of the rules of *res judicata* reflect primarily procedural policies. Thus, the basic rules of claim and issue preclusion in effect define finality and hence go to the essence of the judicial function. See §§ 17-28. These should be defined by federal rule.

In *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329 (10th Cir. 1988), the Tenth Circuit adopted § 87 of the Restatement and the federal law controls rule. The court found the federal law controls rule the proper approach, "at least insofar as the *res judicata* issue is not distinctly substantive." *Id.* at 1333. The Tenth Circuit has defined "distinctly substantive" as involving state rules of privity. *Id.* State rules of privity are not as issue in the instant action.

The Tenth Circuit recently offered guidance with respect to the issue in *American Motorists Ins. Co. v. General Host Corp.*, 946 F.2d 1482 (10th Cir. 1991), noting that if there is any doubt, the Tenth Circuit will likely affirm *Petromanagement* and the Restatement and apply federal preclusion law except where the matter is distinctly substantive.

The Fourth Circuit adopted the Restatement (Second) of Judgments § 87 in *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1989). The court stated that the Fourth Circuit recognizes that:

> Whether a federal court sits in diversity or has some other basis of jurisdiction, questions of the effect and scope of its judgment involve the power of the federal tribunal itself, and are not varied merely because state rules of decision underlie the judgment. (Citations omitted.)
>
> * * *
>
> The judgment of a federal court is no less a federal judgment because it was rendered in diversity. 'Federal law determines the effects under the rules of res judicata of a judgment of a federal court,' Restatement (Second) of Judgments § 87 (1982) . . .

Id. at 1179. Thus, petitioner's assertion that there is a conflict in the Tenth and Fourth Circuits is illusory.

Although there appears to be some degree of confusion in the D.C. Circuit and the Third Circuit with respect to the choice of law issue, a close examination of the courts' decisions reveals that it is unnecessary for the courts to decide the issue. In *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493 (D.C. Cir. 1983), the court held that a federal court exercising diversity jurisdiction shall apply the federal rules of *res judicata* in determining the effect given a prior judgment rendered in a federal court sitting in diversity jurisdiction.

Just one year later, the court appeared to change course and limit *Hunt* in *Answering Service, Inc. v. Egan*, 728 F.2d 1500 (D.C. Cir. 1984). In *Egan*, the court found that whenever the cause of action at issue is state created, the court must apply state substantive law, including those aspects of the state's *res judicata* law. However, as pointed out by Circuit Judge Scalia in his

concurring opinion, it was unnecessary for the court to reach the issue because whether the court applied district or federal law, the outcome of the case was the same.

The situation in the Third Circuit is similar to the D.C. Circuit. The Third Circuit has consistently refused to resolve the issue of whether to apply federal *res judicata* law in successive diversity actions. For example, in both *Donegal Steel Foundry Co. v. Accurate Products Co.*, 516 F.2d 583 (3rd Cir. 1975), and *Lubrizol Corp. v. Exxon Corp.*, 929 F. 2d 960 (3rd Cir. 1991), the court refused to resolve the issue because the result of applying either state or federal *res judicata* law would be identical. In *Lubrizol Corp.*, despite the court 's acknowledgement that the choice of law was not outcome determinative, the court applied federal *res judicata* law in rendering its decision. Thus, it appears as though the issue need not be resolved in the Third Circuit until such time as the choice of law will make a difference in the outcome of a particular action.

The only Circuit that appears to be in a state of confusion with respect to whether federal law should govern the question of the *res judicata* effect of a prior judgment rendered in federal court is the Eighth Circuit . In *Poe v. John Deere Co.*, 695 F . 2d 1103 (8th Cir. 1982), the court held that federal *res judicata* law governs the effect of a prior judgment rendered by a federal court either sitting in diversity or federal question jurisdiction.

The *Poe* action is remarkably similar to the case at bar. In *Poe*, plaintiff initially brought claims in district court, alleging violations of Title VII and 42 U.S.C. § 1981, claiming race discrimination. On the first day of trial, Poe moved to amend her Complaint to add state law claims, but the court denied her motion. On the same day, Poe filed a Complaint in state court, alleging the same state law claims she tried to amend in her original Complaint in federal court. The case was removed to the district court on

diversity jurisdiction. Applying federal *res judicata* law, the court found plaintiff's state law claims were barred.

On the other hand, later decisions in the Eighth Circuit appear to be contrary to *Poe*. For example, in *Lane v. Sullivan*, 900 F.2d 1247 (8th Cir. 1990) and *Iowa Elec. Light and Power v. Mobile Aerial Towers*, 723 F.2d 50 (8th Cir. 1983), the Eighth Circuit applied state *res judicata* law to prior decisions of federal courts sitting in diversity jurisdiction. However, the issue in both cases was not *res judicata* or claim preclusion, but rather issue preclusion. In *Iowa Elec. Light*, the court noted the distinction between *res judicata* and issue preclusion or collateral, citing *Montana v. United States*, 440 U.S. 147 (1979), at footnote 3 of its opinion. Thus, it appears as though the Eighth Circuit applies federal *res judicata* principles if the issue is claim preclusion, as in the captioned matter, and state *res judicata* law if the issue is issue preclusion. Issue preclusion or collateral estoppel is not at issue in the captioned matter.

The only Circuit to seemingly establish that a forum state's law applies to determine the preclusive effect of a previous judgment rendered in a federal court sitting in diversity jurisdiction is the Ninth Circuit. In *Costantini v. Trans World Airlines*, 681 F.2d 1199 (9th Cir. 1982), the court found that California law determines the *res judicata* effect of a prior federal court's judgment. California law, however, applies federal *res judicata* law in this situation, and as a result, federal law was applied by the court.

Similarly, in *Bates v. Union Oil Co. of California*, 944 F.2d 647 (9th Cir. 1991), the court found that in a subsequent diversity action, the forum state's law applies to determine the preclusive effect of a previous diversity action judgment. Looking to Oregon law, the court concluded that Oregon had not resolved whether it would apply its own law or federal law to determine the preclusive

applied federal *res judicata* law. Thus, even though the Ninth Circuit states that it will apply state law to determine the preclusive effect of a prior federal court judgment, the court has consistently applied federal *res judicata* law.

As evidenced by the courts' decisions, a review of all the circuits reveals that the majority of courts apply federal *res judicata* law in determining the preclusive effect of a prior federal court judgment regardless of whether the court sat in diversity or federal question jurisdiction. The majority includes the First, Second, Fourth, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits.

Based on the case law from the Third, Ninth and D.C. Circuits, it is not necessary for the Supreme Court to decide the issue. As illustrated by the decisions, whether state or federal law is applied, it is not outcome determinative. As noted by then Judge Scalia, in his concurring opinion in *Answering Service, Inc. v. Egan*, 728 F. 2d 1500 (D. C. Cir. 1984), it is unnecessary to reach the issue where there is no conflict:

> Where that is so, federal courts sitting in diversity cases frequently do not decide which of the identical rules (the state or the federal) they are applying.

Id. at 1507.

The only Circuit that has not fully decided the issue is the Eighth Circuit. It is likely that the Eighth Circuit will resolve its own conflicting decisions. Even if the circuit chooses not to do so, the Supreme Court need not grant certiorari simply because one Circuit has not decided an issue with the majority.

IV.

WHETHER THE APPLICATION OF FEDERAL RES JUDICATA LAW, BY A FEDERAL COURT SITTING IN DIVERSITY JURISDICTION AND DETERMINING THE PRECLUSIVE EFFECT OF A PRIOR FEDERAL JUDGMENT, VIOLATES THE ERIE DOCTRINE.

Petitioner claims that the Erie Doctrine, as set forth in *Erie R. Co. v. Thomkins*, 204 U.S. 311 (1938), requires a federal court sitting in diversity jurisdiction to apply substantive state law only when the results from the application of the federal law are different enough to arouse equal protection concerns and influence a litigant's choice of forum. This may be so; however, the considerations central to the Erie Doctrine are not implicated by application of federal law to the *res judicata* issues in the instant action.

Courts applying federal *res judicata* law generally hold that preclusion rules are not the sort of procedural issues to which the Erie Doctrine applies. *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960 n. 2 (3rd Cir. 1991). This general rule is fully applicable in the case at bar. The application of federal or state *res judicata* law is not outcome determinative in the instant action. Therefore, one of the main concerns under the Erie Doctrine with respect to forum shopping, is not at issue here. It makes little difference to the litigants which forum the action is brought in when the same conclusions will be reached regardless of the court's choice of law. Thus, no inequities exist in the present action.

Further, many federal courts adopt the reasoning set forth in *Kern v. Hettinger*, 303 F.2d 333 (2nd Cir. 1962), in which Judge Medina explained why the *res judicata* effect of a federal court diversity judgment should be determined according to federal law in a subsequent diversity case:

> One of the strongest policies a court can have is that of determining the scope of its own judgments. [Citations omitted] It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. The rights and obligations of the parties are fixed by state law. These may be created, modified and enforced by the state acting through its own judicial establishment. But we think it would be strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established and given power also to enforce state created rights. The Erie doctrine [citations omitted] is not applicable here . . . .

Kern, 303 F.2d at 340; *Aerojet-General Corporation v. Askew*, 511 F.2d 710, 716 (5th Cir. 1975); *Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978); *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1496 (D.C. Cir. 1983); *Johnson v. SCA Disposal Services of New England*, 931 F.2d 970, 974 (lst Cir. 1991).

Petitioner claims that the Sixth Circuit's application of federal *res judicata* law deprived him of his day in court. Nothing could be further from the truth. We are now before another Court for the fifth time since the inception of this action in Sherman I and its appeal and the instant action and its appeals. Petitioner has had more than an adequate opportunity to place his causes of action before the court.

CONCLUSION

The petitioner's Writ should be denied because petitioner sets forth no reason that meets the requirements of Sup. Ct. R. 10. Furthermore, the application of choice of law in this action was not outcome determinative. Petitioner would not have succeeded under either state or federal laws of *res judicata.*

Therefore, based on the foregoing, respondents respectfully request the Court deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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Attorneys for Respondents

APPENDIX A — MOTION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5: 89 CV 1230

JUDGE ALICE BATCHELDER

BRIEF IN OPPOSITION TO MOTION
FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT

ROY E. SHERMAN

Plaintiff,

vs.

CHASE PACKAGING CORP.

Defendant.

PLAINTIFF'S MOTION FILED ON THE EVE OF TRIAL WHICH SEEKS TO ADD A NEW THEORY OF RECOVERY MUST BE DENIED AS UNTIMELY AND PREJUDICIAL

This action arises from a Complaint filed on June 23, 1989 arising from plaintiff's discharge in January, 1989.

On October 4, 1990, virtually on the eve of trial, plaintiff has now filed a Motion for Leave to File an Amended Complaint to add a totally new claim for "negligent and intentional misrepresentation to conform to the evidence." Attached in

support of the Motion is a purported transcript of a conversation plaintiff claims to have had with Bill Ludington on *January 13. 1989,* over five months before this action was commenced.

Therefore, this is not newly discovered evidence, but there is no question that plaintiff has been in possession or aware of the alleged "evidence" necessary to support this new cause of action since January 13, 1989, and elected not to assert it until the last minute.

In Fact, conspicuous by its absense is any explanation or justification by plaintiff as to why he has waited to the last minute to interject the claim into this lawsuit. The reason, however, is obvious – to prejudice defendant since discovery has been closed for over 30 days and prior to the instant Motion being filed, defendant had no notice it would be presented with or have to defend on this new claim.

Under such circumstances, it is well recognized that a Motion to Amend must be denied when a party seeking leave to amend has unduly delayed and allowing amendment would prejudice the non-movant. *Issac v. Harvard University,* 769 F.2d 817, 829 (lst Cir. 1985); *Mercantile Trust Co. v. Inland Marine Product Corp.,* 542 F.2d 1010, 1013 (8th Cir. 1976); *Jordan v. County of Los Angeles,* 669 F.2d 1311, 1324 (9th Cir. 1982).

For example, in *Deasy v. Hill,* 833 F.2d 38 (4th Cir. 1987), a plaintiff who did not act to amend the complaint until the eve of trial, and after discovery had closed (despite being aware for several months of the new claim) was precluded from doing so by the Court which observed at p. 41:

> A party who delays in seeking an amendment is acting contrary to the spirit of the rule [Fed. R.

> Civ. P. 15]. 6 Wright & Miller, *Federal Practice and Procedure* § 1488 (1971). Amendments near the time of trial may be particularly disruptive, and may therefore be subject to special scrutiny. *See First National Bank of Louisville v. Master Auto Service Corp.*, 693 F.2d 308, 314 (4th Cir. 1982) (motion to amend properly denied when made nineteen days before trial and where amendment was not the result of movant's discovery of new facts); *Woodson*, 614 F.2d at 942-43 (denial of leave to amend upheld where plaintiff, who had been aware for some time of the new claim, moved to amend immediately prior to trial). Here the delay was significant, and the motion to amend came right before trial and after discovery was complete. In these circumstances, the district judge was entitled to regard the delay as unwarranted.

Therefore, it is clear that plaintiff's untimely Motion must be denied.

Respectfully submitted,

s/ Craig S. Cobb
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Appendix A

CERTIFICATE OF SERVICE

A copy of the foregoing Brief in Opposition to Motion for Leave to File Second Amended Complaint was served upon Ellen Simon Sacks, Esq. and James Marx, Esq., attorneys for plaintiff, Spangenberg, Shibley, Traci & Lancione, 1500 National City Bank Building, Cleveland, Ohio 44114, on this 11th day of October, 1990.

s/ Craig S. Cobb
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